In the Supreme Court of the United States.

OCTOBER TERM, 1918.

GABE E. PARKER, SUPERINTENDENT FOR the Five Civilized Tribes, et al., appellants,
v.
TOOTIE RILEY, A MINOR, BY U. C. STOCKTON, her guardian, et al.
No. 254.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

STATEMENT.

The appeal in this case (R. 52) is by the superintendent and disbursing agent for the Five Civilized Tribes from a decree of the Circuit Court of Appeals for the Eight Circuit (R. 51) affirming a decree of the District Court for the Eastern District of Oklahoma (R. 26) which directed the appellants to distribute equally among the heirs of Emma Derrisaw, a deceased full-blood Creek Indian allottee, the proceeds of an oil and gas lease of her homestead allotment.

Opinions: D. C. (R. 22), 218 Fed. 391; C. C. A. (R. 37), 243 Fed. 42; dissenting opinion (R. 46), 243 Fed. 51.

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The facts were stipulated. Emma Derrisaw, a full-blood Creek Indian allottee, died in November, 1908. She left as her heirs two daughters, Tootie Riley and Julia Willingham, and a husband, Doc Willingham. Tootie Riley was born about the year 1902 and Julia Willingham was born February 11, 1907. On October 13, 1912, all the heirs joined in executing an oil and gas lease for that portion of the allotment of Emma Derrisaw which embraced the homestead of 40 acres, the two children who are minors being represented by their guardians. The lease was in accordance with the rules and regulations of the Secretary of the Interior and was approved by him. The fund in controversy consists of royalties to the amount of over $15,000 received and held by the appellants and future royalties to accrue under the terms of the lease. R. 13–14.

The appellants have no interest in the controversy except to hold and pay over the money as required by law and the regulations of the Secretary of the Interior, and they allege that the entire proceeds of the lease belongs to the daughter, Julia Willingham, because she was born after March 4, 1906. R. 12.

The question for decision depends upon the true construction of the act of May 27, 1908, 35 Stat. 312. The pertinent provisions, consisting of a portion of section 1 and the whole of sections 2 and 9, are as follows:

> That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civi-

lized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full bloods, and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not

been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee

shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Assignment of Errors.

The various errors alleged in the assignment (R. 53) may be reduced to two, viz:

1. Error in ruling that the proceeds of the oil and gas lease on the Creek homestead allotment of Emma Derrisaw, deceased, belong to her heirs in equal parts.

2. Error in not ruling that the proceeds of said oil and gas lease belong entirely to Julia Willingham, the child born after March 4, 1906.

Propositions.

1. The life interest of Julia in her mother's homestead allotment is exclusive and not subject to termination by removal of restrictions on alienation.

2. The right of Julia to receive the oil and gas royalties is not governed by the common-law rule relating to life tenants and remaindermen but results from the purpose of Congress as expressed in the act of 1908.

3. The common-law rule relating to the respective rights of life tenants and remaindermen in the royalties derived from an oil and gas lease executed by both after inception of the life estate would give to Julia the income from the fund during her life.

I.

As the deceased allottee was a full-blood Creek Indian, and as Julia Willingham, one of her surviving children, was born after March 4, 1906, and before May 27, 1908, the rights of this child in the homestead of the allottee depend primarily on the language of the second proviso of section 9 of the act of May 27, 1908, 35 Stat. 315, which declares:

> That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in sec-

> tion one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

The main purpose of this provision is clear enough. It was to set apart the homestead of a deceased allottee "for the use and support" of any surviving child or children born since March 4, 1906, "during their life or lives." The motive for this is certain. It was to provide for Indian children born to allotted citizens after the date when the right to receive an allotment of tribal land no longer existed. That date had been fixed as March 4, 1906, by the act of April 26, 1906, 34 Stat. 137, § 2. In previous legislation similar dates had been fixed for the closing of allotments to Creek Indian children, and similar provisions were made for children born thereafter. Thus the act of March 1, 1901, 31 Stat. 861, known as the Original Creek Agreement, closed the allotment roll to citizens living April 1, 1899, and to the children of enrolled citizens born thereafter and living July 1, 1900 (§ 28, p. 870), and provided (§ 7, p. 864):

> The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation free from such limitation.

Similarly the act of June 30, 1902, 32 Stat. 500, known as the Supplemental Creek Agreement, extended the period for allotment of Creek children to those born to enrolled citizens "subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date" (§ 7, p. 501), and with respect to the children of deceased allottees born after the latter date, provided (§ 16, p. 503):

> The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed.

The provision in section 9 of the act of 1908 is obviously an extension to all the Five Tribes of the Creek policy to provide in a limited way for the surviving children of deceased allottees born too late

to receive allotments. This is made certain by reading the language expressing that purpose apart from the other provisions with which it is confused, thus:

> That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain . . . for the use and support of such issue, during their life or lives . . . but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, . . . the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

The language omitted relates to another subject, that of restrictions on alienation, and its insertion in this section was made necessary because of other provisions of the act relating to that subject. Section 1 restricts the alienation of "all homesteads" of allottees "having half or more than half Indian blood" until April 26, 1931, and authorizes the Secretary of the Interior to "remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." And the first part of section 9 provides that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land," except as to full-blood In-

dian heirs. To avoid conflict it became necessary to provide in connection with the life interest in the homestead given to after-born children that such land should be "inalienable" until April 26, 1931, unless restrictions against alienation should be removed by the Secretary of the Interior "in the manner provided in section one," or unless the life tenant should die before that date. The entire separability of the clauses made necessary by other provisions of the act from those creating the life interest is at once manifest on reading the provision in question with the former clauses inclosed in brackets, thus:

> That if any member of the Five Civilized Tribes [of one-half or more Indian blood] shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain [inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof,] for the use and support of such issue, during their life or lives, [until April twenty-sixth, nineteen hundred and thirty-one]; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, [or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one] the land shall [then] descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

It is thus apparent that the insertion of words made necessary by other provisions to preserve harmony was not intended to modify in any respect the life interest otherwise conferred, and that the provisions for restrictions on alienation, and for their removal by lapse of time or action of the Secretary before the termination of the life interest, were intended to have no other effect on that interest than to regulate the manner of its conveyance.

Any other construction would impute to Congress the intention to repudiate its solemn agreements with the Creek Tribe before referred to (31 Stat. 864, § 7; 32 Stat. 503, § 16) that "the homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after" the time fixed for closing allotments. We can see no reason to suppose that Congress had any such intention.

The courts below ruled that the life estate of the child Julia was terminable by the removal of restrictions on alienation of the land, and that the approval of the oil and gas lease by the Secretary of the Interior was such removal of restrictions and termination of her life interest in the oil and gas contents of the land. We believe that this ruling is a plain perversion of the purpose expressed in section 9 of the act and without support in any other provision.

The conclusion that the life interest is terminable by removal of restrictions on alienation, must find support if at all in the clause of section 9 author-

izing the Secretary to remove restrictions "in the manner provided in section one hereof." This specific reference to section 1 can not be disregarded. The power there given to remove restrictions is general in its scope and is found in connection with a general provision forbidding the alienation of all homestead allotments before April 26, 1931, and section 1 makes no direct reference to any sort of lease. But section 2 does specifically deal with leases and authorizes oil and gas leases to be made "with the approval of the Secretary of the Interior and not otherwise." In order to hold that the words of section 9, authorizing the removal of restrictions "in the manner provided in section one," also authorizes the removal of restrictions by approval of an oil and gas lease as provided in section two, it is necessary to conclude either that nothing was meant by this specific reference to section 1 or that the use of the word "one" was intended to include the meaning of the word "two."

To meet this difficulty the majority of the Court of Appeals argued (R. 40) that—

> as the whole is greater than any of its parts and includes them all, section one includes the power to remove the restrictions on the leaseholds and their products which the Secretary is also empowered to remove by means of his approval of leases under section two.

It seems to us that this reasoning involves the assumption that the provision of section 2 is wholly superfluous and that it was so regarded by Congress

when in section 9 specific reference was made to section 1.

Moreover, the lease itself in this case, concededly in lawful form, may be surrendered by the lessee and is also subject to cancellation for violation of any of its substantial terms and conditions. R. 18. If it could be regarded as a removal of restrictions on alienation of the oil and gas in the ground, its surrender or cancellation would have to be regarded as a reimposition of such restrictions, unless the oil and gas contents of the land were considered as thereafter subject to unrestricted alienation.

II.

In the case of a technical life estate at common law, mineral deposits, unopened and unauthorized to be opened at the time of the inception of the life tenancy, belong to the remainderman as a part of the land. *Koen* v. *Bartlett*, 41 W. Va. 559, 565–567, and cases cited; *Higgins Oil & Fuel Co.* v. *Snow*, 113 Fed. 433, 437–439, and cases cited. But in section 9 of the act of 1908 Congress was not dealing in common-law technicalities, and the authority to explore and operate this land for oil and gas was provided in section 2. The purpose in mind was to insure something of real and substantial present value for orphan children of allottees born too late to receive allotments. Other children and the surviving parent had been amply provided for and were not then the subject of especial anxiety. In the case of land mainly valuable for oil and gas this purpose would have

been largely defeated by a provision for a mere technical life estate in 40 acres of the parent's allotment without some provision for extraction and use of those minerals. If the technical objection against the opening of mines by a life tenant was at all considered, it is reasonable to conclude that this objection was intended to be met by the authority conferred by section 2 on the Secretary of the Interior to approve oil and gas leases.

It is suggested that a division of the royalties among the heirs gives something to the child Julia because she is one of them. But we find no justification for such a division. She is an heir, indeed, but only for her life. She is not a remainderman. On her death the estate goes to the heirs of her parent the deceased allottee. Nothing goes to her heirs, unless it be something received by her during life as rents and profits from her parent's homestead over and above what is necessary for her support. Moreover, her sister and father, the other claimants, are not heirs at present and may never become such. If they should die before Julia's death, which is likely in the natural course, they never will come into the remainder. It is hardly conceivable that Congress intended to authorize this oil and gas lease for the present benefit of those already amply provided for in their own right and who might never inherit the land, and restrict the one who had received nothing in her own right, and who was therefore the subject of especial concern, to the mere use for farming and grazing purposes. The

courts below attempted to overcome these difficulties by holding that Julia's life estate in the land was subject to termination by removal of restrictions on alienation, and that the Secretary's approval of the oil and gas lease was such removal of restrictions as to the oil and gas in the land. But that conclusion, as we have heretofore shown, can not be arrived at without disregarding or changing the plain meaning of the controlling words of the act.

III.

The decree of an equal division of the royalties among all the heirs of the deceased allottee can not be sustained on common-law principles. Considering the lease as a sale of that part of the land consisting of the oil and gas, notwithstanding restrictions on alienation, as considered by the courts below, it is necessary to consider also the fact that all of the heirs joined in executing the lease, the two daughters who are minors by their guardians. R. 13, 19. If this be regarded as a conveyance by both the life tenant and the remaindermen, the common-law rule is that the former is entitled to the income from the royalty fund at not less than the legal rate of interest during her life. *Barnes* v. *Keys*, 36 Okla. 6, 7–9, and cases cited.

If this be the correct rule (which we do not admit) it can only be so by virtue of regarding the lease by the Secretary of the Interior as a removal of restrictions on alienation "in the manner provided in section one" of the act. That section authorizes

such action "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." 35 Stat. 312. This would be ample authority for investment of the royalty fund during the life of Julia and the use for her benefit of the income. No such regulation was made in this case doubtless because the Secretary believed that Julia was entitled to the entire fund during her life, as his representatives the appellants now contend. But such regulation can be made if necessary under the terms of the lease. It provides in section 2 for payment of the royalty to the Indian superintendent (R. 16) and in section 8 (R. 18) that:

> This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease.

That part of the decree which directs "payments to be made in accordance with the rules and regulations of the Secretary of the Interior in such cases provided" (R. 26) is not objectionable.

Section 25 of the "Regulations Governing Leasing of Lands and Removal of Restrictions of Members of the Five Civilized Tribes, Reprinted June 1, 1916," reads as follows (p. 12):

> 25. All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be deposited by the Indian agent or other Government officer to whom paid, to the credit of the guar-

dian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdrawn therefrom by such guardian or curator, with the consent of the United States Indian agent, in sums not exceeding $50 per month unless otherwise ordered by the court. Sums in excess of $50 per month may be withdrawn on order of the proper court and not otherwise. Such designated banks shall furnish satisfactory surety bonds, to be approved by the Secretary of the Interior, guaranteeing the safe care and custody of the funds so deposited. (Amended July 23, 1910. See p. 31.) (Amended Nov. 29, 1912. See p. 38.)

An amendment adopted November 29, 1912 (p. 38), provides:

Section 25 of the Revised Regulations of April 20, 1908, covering the leasing of the lands in the Five Civilized Tribes repromulgated June 20, 1908, is further amended by adding to the said section as rewritten and amended July 23, 1910, the following:

"Provided, however, that the said superintendent, or other officer in charge of the Union Agency, is authorized, in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents or payments accruing under any lease have been paid to said superintendent, to withhold the disbursement of such royalties, rents or payments, wholly or in part from any such adult,

or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs."

CONCLUSION.

It is respectfully submitted that the decrees of the Circuit Court of Appeals and the District Court should be reversed and that the cause should be remanded to the District Court with directions to enter a decree establishing the right of Julia Willingham to the accumulated royalties from the oil and gas lease and to the royalties to accrue in the future during her life.

FRANCIS J. KEARFUL,
Assistant Attorney General.

MARCH, 1919.

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